



### Reasons for decision

Nishnawbe-Aski Police Services Board,

*applicant,*

*and*

Public Service Alliance of Canada,

*bargaining agent,*

*and*

Anishinabek Police Service,

*intervenor.*

Board File: 29211-C

Neutral Citation: 2013 CIRB 701

November 25, 2013

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The Canada Industrial Relations Board (the Board) was composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. John Bowman and Robert Monette, Members. This matter was heard by the Board in Toronto, Ontario on June 10 and 11, 2013 and September 23 and 24, 2013.

#### **Appearances**

Mr. Robert C. Edwards, counsel for the Nishnawbe-Aski Police Services Board;

Mr. Michael Fisher, counsel for the Public Service Alliance of Canada;

Mr. David Cowling, counsel for the Anishinabek Police Service.

## **I. Facts**

[1] Pursuant to certification orders issued by the Board, the Public Service Alliance of Canada (PSAC or the union) is the certified bargaining agent for two bargaining units of employees employed by the Nishnawbe-Aski Police Services Board (NAPS or the employer). The union was first certified for a unit of civilian employees in July 2005; this order was amended at the employer's request in May 2011 to exclude the position of human resources generalist (Board order no. 10041-U). Employees engaged in front-line policing activities were originally represented by the Canadian First Nations Police Association (Board order no. 7924-U, issued November 3, 2000). The PSAC obtained representation rights in respect of the police officer bargaining unit in May 2006 (Board order no. 9113-U). Over the years, the union and the employer have successfully negotiated collective agreements applicable to these units.

[2] On January 10, 2012, the NAPS filed an application under section 18 of the *Canada Labour Code (Part I-Industrial Relations)* (the *Code*), challenging the Board's constitutional jurisdiction to issue the certification orders and asking that they be rescinded. The Anishinabek Police Service (APS), which has a similar application of its own pending before the Board (Board file no. 29164-C) sought and was granted intervenor status in this matter.

[3] The NAPS was established by the Nishnawbe-Aski Nation (NAN) to provide effective, efficient and culturally appropriate police services for the people of the Nishnawbe-Aski area. The NAN is composed of 49 First Nations communities who are signatory to either Treaty No. 5 (signed in 1875) or Treaty No. 9 (signed in 1905). The NAN area covers about two-thirds of the province of Ontario, and extends from the Manitoba to the Quebec borders. Treaty No. 5 also covers a large part of the province of Manitoba, but only those Treaty No. 5 First Nations in Ontario are part of NAN.

[4] Between 1873 and 1960, First Nations were policed by the Northwest Mounted Police (NWMP) and subsequently the Royal Canadian Mounted Police (RCMP). Although it continues to provide service to First Nations communities in the other provinces, the RCMP began to withdraw from policing activities in Ontario and Quebec in the 1960s. At the time, there was no

consultation with First Nations and they did not consent to what they perceived as a downloading of federal responsibility for the protection of First Nations communities.

[5] When the RCMP withdrew from its activities in Ontario, policing of First Nations became the responsibility of the Ontario Provincial Police (OPP). Concurrent with the withdrawal of the RCMP, the concept of Band Constables, 100% funded by the federal government, was introduced. Band Constables were Band employees who provided front-line policing (primarily enforcement of Band bylaws and other local matters) and referred cases involving the *Criminal Code* (R.S.C., 1985, c. C-46) or other federal or provincial legislation to the RCMP or OPP. Band Constables took direction and supervision from the Chief and Council. This concept was confirmed in the federal Department of Indian Affairs and Northern Development (DIAND)'s Circular 55 issued in 1971. Subsequently, the RCMP, OPP and Quebec Provincial Police also instituted aboriginal Special Constable programs, involving the hiring and training of aboriginal officers who were then assigned to a specific First Nation community. The Aboriginal Special Constables were employees of the federal or provincial police force, rather than the Band. This program provided an alternative to the Band Constable system.

[6] In the late 1980s, the federal government undertook a comprehensive review of policing in Aboriginal communities that resulted in a First Nations Policing Policy (FNPP) applicable to all First Nations in Canada. The FNPP envisions that a self-administered First Nation police service will be established and governed by a First Nation or band council, usually through a police commission. In 1992, Canada, Ontario, the NAN and other First Nations signed the Ontario First Nations Policing Agreement (OFNPA). This Agreement enshrines the principle that First Nations in Ontario should decide what kind of policing arrangements are best suited to their communities. Paragraph 4 of the OFNPA provides examples of options for the delivery of police services from which First Nation governments could select, including entering into an agreement with municipal or regional police services or the OPP for police services, having their own police service, or having a First Nation regional police service controlled by a First Nation police governing authority operating on a group of First Nation territories. The NAN selected the latter option. The OFNPA envisions that such self-administered police services will be headed by a chief of police who reports to a police commission established by the First Nation(s).

[7] Implementation of the Nishnawbe-Aski Police Services Agreement (the NAPS Agreement) commenced on April 1, 1994. This Agreement set out the composition of the NAPS Board and a schedule for the transfer of all policing responsibilities for the NAN communities from the OPP to the NAPS. As of the time of the Board's proceedings, the NAPS had completed the transition to an autonomous, independent First Nations police service with its own police services board.

[8] Pursuant to the NAPS Agreement, the NAPS is responsible for most policing services within the Nishnawbe-Aski area, which was initially defined as "generally, that part of the Province of Ontario covered by Treaties No.9 and No.5." In the most recent iteration of the NAPS Agreement (2009-2012), the Nishnawbe-Aski area was redefined as "the area occupied by communities identified in Schedule "B" of this Agreement." Schedule "B" consists of a list of 35 participating First Nations. Consequently, the NAPS does not have jurisdiction in all of the NAN communities, as certain First Nations (for example, Wawakapewin and Pikangikum) have opted not to be policed by the NAPS. Some of these communities have Band Constables or First Nations Special Constables of their own, but may request assistance from the NAPS and/or the OPP for serious matters.

[9] The NAPS has entered into operational agreements with the OPP. Section 4 of those agreements provide as follows:

- 4(1) The Nishnawbe-Aski Police Services has the primary responsibility for the enforcement of all laws and shall be involved in all police operations on its First Nation Territories described in Section 3.
- 4(2) The Nishnawbe-Aski Police Service will be responsible for, as applicable, the enforcement of First Nations laws, the Criminal Code of Canada, Ontario Provincial Statutes, and other Federal Statutes within the Nishnawbe-Aski Police Service Area. The Nishnawbe-Aski Police Service will be involved in all police operations that occur on the Nishnawbe-Aski First Nation communities.

[10] The NAPS General Headquarters is located in Thunder Bay, Ontario. It has two regions: Northwest Region, headquartered in Sioux Lookout with 20 detachments; and Northeast Region, headquartered in Cochrane, with 15 detachments. Neither Thunder Bay or Sioux Lookout are within the Nishnawbe-Aski area. In total, the NAPS employs approximately 150 officers and 38 civilian employees. Of these, approximately 66 work off-reserve (either in the General or a Regional Headquarters), and the remainder work in the on-reserve detachments. In the course of performing their duties, NAPS officers provide service to non-First Nations citizens and enforce

the law in respect of both Aboriginal and non-Aboriginal persons within the territory for which they are responsible.

[11] Geographic realities make effective policing of the NAN area a costly undertaking. Thirty (30) of the 49 NAN communities are in remote locations and are dependent upon some form of air transportation for access to goods and services. For a period of approximately six weeks in the winter, these remote communities are connected by a winter roads system. The NAPS Agreement does not confine the policing jurisdiction of NAPS to Indian reserves as defined in the *Indian Act* (R.S.C., 1985, c. I-5). The Board was informed that, during the winter, some of the NAPS work is off-reserve, for example, on the ice road. In the summer, when there is no ice road, most of the work is on-reserve. Trips off-reserve are generally related to training, prisoner escorts or investigations related to crimes committed on-reserve.

[12] The NAPS has its own Human Resources department, located in Thunder Bay, Ontario which is responsible for the recruitment of police officers. It applies selection criteria similar to those used by municipal police services and the OPP. The individual NAN First Nations do not have a formal role in the selection process, although Chief and Council may provide a letter of support for a particular candidate. These recommendations are forwarded to the Chief and/or Deputy Chief of Police. Once selected by NAPS, the recruits are required to successfully complete training at the Ontario Police College. Once a recruit has qualified as First Nations Constable, he or she can be appointed by the Commissioner of the OPP under section 54 of the *Ontario Police Services Act*, RSO 1990, c. P.15 (the *PSA*), which confers on them the powers of a police officer for the purpose of carrying out the duties specified in the NAPS Agreement.

[13] Currently, all NAPS officers hold appointments from the OPP Commissioner under section 54 of the *PSA*. Consequently, pursuant to the NAPS Agreement, NAPS Officers are authorized to enforce Ontario and federal laws in the Nishnawbe-Aski area, as well as Band by-laws.

[14] The issue for the Board is whether the relationship between NAPS and its employees is subject to federal regulation for labour relations purposes.



## II. Positions of the Parties

### A. The Applicant

[15] The NAPS relies on the decision of the Supreme Court of Canada in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45; [2010] 2 S.C.R. 696 (*NIL/TU,O*), for the proposition that its operations as a police service are within provincial jurisdiction for labour relations purposes. However, it candidly admits that the motive for this application is its desire to obtain a ruling affirming provincial jurisdiction that will enable it to force the province to deal with what it perceives as a lack of support for adequate and effective police services in First Nations communities in Ontario.

[16] The NAPS affirms that the NAN is not seeking to assert any inherent right under section 35 of the *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (U.K.), 1982 c.11 (*Constitution Act, 1982*) and contends that it is improper for the respondent to invoke aboriginal inherent rights in the context of this application.

[17] The NAPS contends that policing is a provincial responsibility pursuant to section 92 of the *Constitution Act, 1867*, 30 & 31 Victoria, c.3. (U.K.) (*Constitution Act, 1867*). Although policing is not specifically mentioned in section 92, subsection 14 of that provision lists "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts" as a subject of exclusive provincial legislative power. The NAPS asserts that the functional test set out in *NIL/TU,O* is conclusive of provincial jurisdiction over its operations, but that if it is not, provincial regulation of the NAPS' labour relations would not impair the core of federal power over Indians and the lands reserved for the Indians set out in section 91(24) of the *Constitution Act, 1867*.

[18] The NAPS points out that its officers are appointed by the Commissioner of the OPP and consequently that they have jurisdiction throughout the Province of Ontario. Their functions are the same as those of other police services in Ontario. While a majority of its activities are on-reserve, the NAPS does engage in activities off-reserve, such as prisoner escorts and assists to

other police services. The NAPS provided an example of a joint operation it participated in with the OPP in Mississauga involving a drug ring.

#### **B. The Union**

[19] The PSAC argues that the NAPS is an independent, stand-alone police service with a mandate to police the NAN communities, which consist primarily of the reserves and adjacent treaty territories. It asserts that any policing NAPS officers do outside the NAN communities is secondary or ancillary to this mandate. It suggests that the NAPS Agreement is an agreement between three governments: Canada, Ontario and NAN. The union suggests that the NAPS owes its existence to this tri-partite agreement, and not to the *PSA*. Under the NAPS Agreement, the NAPS has the authority to appoint, control and discipline its members, independent of the provincial statute. The union asserts that the ongoing funding and operational issues identified by the NAPS exist independent of which government has jurisdiction over the NAPS' labour relations. It argues that the application of the functional test conclusively points to federal jurisdiction over the NAPS.

[20] The PSAC points out that the *Indian Policing Policy Review Task Force Report* of January 1990 (Exhibit 2-1), which precipitated the FNPP, concluded that the issue of constitutional responsibility has been the primary obstacle to the development of a clear federal policing policy. The Report sees the roles and responsibilities of each government operating at two levels: responsibility for Indians generally and responsibility for policing Indian reserves specifically. It noted that the move towards aboriginal self-government also affects the legal context. The Task Force concluded that jurisdiction over on-reserve policing is shared, and that each party has a measure of responsibility and a role to play. It encouraged the parties to work co-operatively to resolve the issue.

[21] The FNPP itself (Exhibit 2-2) states that its purpose is to contribute to the improvement of social order, public security and personal safety in First Nations communities; to provide a practical way to improve the administration of justice for First Nations through the establishment of First Nations police services; and to support the federal policy on the implementation of the inherent right and the negotiation of self-government.

[22] The union asserts that the FNPP was the blueprint for the OFNPA, which permits each Ontario First Nation to decide on the kind of policing arrangements that will apply in their community.

[23] The union submits that the NAPS does not have a legislative foundation and is not a police service that falls under the *PSA*. For example, NAPS officers are not subject to the statutory discipline procedures contained in the *PSA*. The fact that the NAPS adheres to or endeavours to adhere to provincial policing standards is a matter of the NAPS' own choice, rather than as a result of any provincial statute or regulation. Accordingly, the union asserts that the First Nations, not the province, controls First Nations policing.

[24] The union submits that the NAPS is a federal undertaking because it engages the federal interest in Indians and lands reserved for the Indians. It further submits that provincial regulation of its labour relations would impair the core of federal responsibility under section 91(24) of the *Constitution Act, 1867*.

### **C. The Intervenor**

[25] The APS supports the position of the NAPS. It argues that policing is a matter of provincial jurisdiction and suggests that the situation is analogous to that found in *Construction Montcalm Inc. v. Minimum Wage Commission et al.*, [1979] 1. S.C.R. 754, where the construction of an airport was found to be subject to provincial jurisdiction despite the fact that the operation of airports is federally regulated. It submits that section 54 of the *PSA* could not apply to the NAPS unless it is provincially regulated.

### **III. Analysis and Decision**

[26] Determination of the question raised by the NAPS in this case is not a simple matter of characterizing the activity as policing and finding that this activity is within provincial legislative jurisdiction, as the employer and the intervenor would have one believe. The issue is far more complex. The Board did not find the jurisprudence submitted by the applicant to be particularly helpful, as the cases either involved different fact situations or the decision makers clearly did not have the benefit of the evidence that was presented to the Board in this case.



[27] Although it is not the intention of this Board to involve itself in debates over the scope of aboriginal inherent rights, consideration of the jurisdictional question cannot ignore the fact that there are three, not two, governments involved in the activities performed by the NAPS. The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties and in the context of the Crown's relationship with treaty First Nations. Recognition of inherent rights is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources. The Government has determined that negotiations between governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government (see *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, <http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>) .

[28] The administration and enforcement of Aboriginal laws, including policing, the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws, are among the topics that the Government of Canada has indicated are subjects for self-government negotiation. With respect to areas that go beyond matters that are strictly internal to an Aboriginal group or integral to Aboriginal culture, such as labour relations, the Government of Canada has taken the position that primary law-making authority is to remain with the federal government.

[29] A document prepared by The First Nations Chiefs of Police Association in partnership with Human Resources Development Canada, entitled "*Setting the Context: The Policing of First Nations Communities*" (Exhibit 2-6) provides an excellent overview of the historical and operational aspects of policing in First Nations communities. Like all societies, First Nations engaged in a form of self-policing for centuries prior to European contact. While aboriginal notions of justice, which were based on conflict resolution, reconciliation and restitution, differed from European notions based on punishment and enforcement of strict rules, First Nations nonetheless had mechanisms to ensure the maintenance of social harmony and

order among their members. These included the intervention of elders and banishment from the community. Both prior to and following the *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No.1, First Nations retained the right to manage their own internal forms of justice. It was only later that the British Crown attempted to extend its legal system to First Nations, by including provisions in treaties requiring them to submit to British laws. Even then, British law tended to apply only to interactions between First Nations people and settlers, while the First Nations continued to apply their respective customary laws to interactions within their community. The extension of federal and provincial laws to activities on First Nations lands since Confederation has evolved gradually, but can be traced back at least to the *Indian Act, 1876*, S.C. 1876, c.18.

[30] From this legal and historical overview and a close review of the OFNPA and the NAN Agreement, it is clear that the governments involved in those tri-partite agreements see First Nations policing as an aspect of self-government. The OFNPA makes it clear that it is each First Nation's prerogative to select the policing arrangements that best suit its own circumstances. The administrative arrangements put in place subsequently are intended to give effect to the First Nations' decisions in this regard.

[31] In *NIL/TU,O*, the Supreme Court of Canada confirmed that the analysis to be used when dealing with section 91(24) of the *Constitution Act, 1867* is no different than that applicable to any constitutional division of powers question. It is trite law that labour relations are presumptively a provincial matter. To displace that presumption requires a two step inquiry. First, a functional test that examines the nature, operations and habitual activities of the entity to determine whether it constitutes a federal undertaking. If this first test is inconclusive, the second step is to ask whether the provincial regulation of the entity's labour relations would impair the "core" of the federal head of power.

[32] Resolution of the issue that is before the Board requires reference to both sections 91(24) and 92(14) of the *Constitution Act, 1867*. Exclusive federal jurisdiction over Indians and lands reserved for the Indians is found in section 91(24) of the *Constitution Act, 1867*, while section 92(14) lists "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction,

and including Procedure in Civil Matters in those Courts" as a subject of exclusive provincial legislative power.

[33] In the Board's view, policing *per se* is not a head of power that is subject to the exclusive legislative jurisdiction of either the federal or provincial government. Policing is a governance function that flows from the need of organized societies to maintain peace and social order within their communities.

[34] Pursuant to its jurisdiction over Indians and lands reserved for the Indians, the federal government has enacted the *Indian Act*. The statutory authority of a First Nation to establish a police commission and a police service currently derives from subsection 81(1)(c) of the *Indian Act*, which provides that a band council may pass a bylaw for the purpose of "the observance of law and order". It is this provision of the federal statute, and not the *PSA*, that authorizes a First Nation to create a police force to enforce its laws. The police commission and police service that NAN has created pursuant to the NAPS agreement finds its foundation in the *Indian Act*, not the *PSA*. Because members of First Nations in Ontario, whether on- or off-reserve, are also subject to provincial and federal laws, and given the vast territory within the NAN area, the parties to the NAN Agreement have entered into very practical and pragmatic arrangements that make it possible for the NAPS officers to enforce the laws of all three levels of government within that territory. The fact that the NAPS officers may occasionally travel outside of NAN territory in carrying out their duties does not change the basis on which the NAPS was created and continues to exist.

[35] As noted above, once a recruit has qualified as First Nations Constable, he or she can be appointed by the Commissioner of the OPP under section 54 of the *PSA*, for the purpose of carrying out the duties specified in the NAPS Agreement. However, First Nations Constables do not thereby become employees of the OPP. The arrangement that allows the NAPS officers to be authorized to perform the same duties as police officers throughout the province appears to have been intended as an interim measure. Section 11 of the first NAPS Agreement provided that:

11.1 It is acknowledged by the Parties that NAN's goal is that the Police Service be recognized and regulated by First Nation law.

11.6 The Parties agree that legislative changes are required to allow the Board to appoint Nishnawbe-Aski Officers with full authority to enforce laws in force on First Nations Territory and federal and provincial laws, and that **until such time as legislative changes are obtained**, Nishnawbe-Aski Officers will be appointed by the Commissioner of the O.P.P.

(emphasis added)

[36] The relevant portions of the *PSA*, authorizing the Commissioner of the OPP to appoint First Nations Constables to perform duties related to policing beyond their immediate jurisdiction as NAPS Officers, read as follows:

54.(1) With the Commission's approval, the Commissioner may appoint a First Nations Constable to perform specified duties.

(2) If the specified duties of a First Nations Constable relate to a reserve as defined in the *Indian Act* (Canada), **the appointment also requires the approval of the reserve's police governing authority or band council.**

(3) The appointment of a First Nations Constable confers on him or her the powers of a police officer for the purpose of carrying out his or her specified duties.

(4) The Commissioner shall not suspend or terminate the appointment of a First Nations Constable whose specified duties relate to a reserve without first consulting with the police governing authority or band council that approved the appointment.

...

(emphasis added)

[37] Thus, although the definition of "police officer" in the *PSA* expressly **excludes** First Nations Constables, by virtue of section 7.2 of the NAPS Agreement, NAPS officers acquire the authority of a police officer throughout the Province of Ontario once they have been appointed by the OPP Commissioner under section 54 of the *PSA*. The Board was informed that all NAPS officers hold appointments from the OPP Commissioner under section 54 of the *PSA*. In other words, the *PSA* does not authorize the creation of the NAPS or govern its operations; section 54 of the *PSA* is simply an enabling provision that permits the Commissioner of the OPP to grant certain powers to First Nations Constables.

[38] In the Board's view, the NAPS situation is distinguishable from that which existed in *NIL/TU,O*.

[39] In *NIL/TU,O*, the essential nature of the NIL/TU,O Child and Family Services Society was to provide child and family services, a matter that is within provincial jurisdiction. Social services are regulated exclusively by the province and the Society's employees' delegated authorities came exclusively from the province. The identity of the designated beneficiaries was held not to change the essential nature of the Society's operations. In that case, the functional test was conclusive and an inquiry into the "core of Indianess" was not required.

[40] In this case, the essential nature of the NAPS is policing, a matter that is not clearly within the exclusive jurisdiction of either the federal or provincial government. The authority for NAPS' existence is found in a federal statute, the *Indian Act*. Members of the NAPS first qualify as First Nations Constables, and then receive delegated authority to enforce provincial laws as a consequence of an administrative arrangement with the OPP. The fact that the NAPS officers then have jurisdiction over both aboriginal and non-aboriginal persons does not change the essential nature of its operations, which is to police Indians and lands reserved for the Indians. The application of the *PSA* to the NAPS for the limited purpose of authorizing its officers to enforce provincial laws within NAN territory does not automatically attract provincial regulation over the labour relations of the NAPS.

[41] As noted earlier, policing is an aspect of governance. The basis for the existence of the NAPS is found in the *Indian Act*, federal legislation enacted pursuant to Parliament's exclusive jurisdiction over Indians and lands reserved for the Indians. Consequently, with respect to aboriginal policing generally, and police services created pursuant to the OFNPA specifically, the Board concludes that the operations of the NAPS are a matter of federal jurisdiction pursuant to section 91(24) of the *Constitution Act, 1867*.

[42] Furthermore, the Board is of the opinion that provincial regulation of the NAPS' labour relations would impair the "core" of the federal authority over Indians and lands reserved for the Indians. As noted above, the federal government is actively engaged in self-government negotiations with many First Nations. By definition, these negotiations go to the heart of governance functions, including policing. Labour laws affect a vital part of the management and operation of an undertaking (see *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749). It would be inconsistent with federal responsibility



over Indians and lands reserved for the Indians if provincial labour legislation were to apply to the instruments of aboriginal governance such as policing.

[43] Accordingly, both the first and second step of the constitutional analysis lead to the conclusion that jurisdiction over the NAPS rests with the federal government, and the *Code* applies to its relations with its employees. The NAPS application under section 18 of the *Code* is therefore dismissed.

[44] This is a unanimous decision of the Board.

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Elizabeth MacPherson  
Chairperson

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John Bowman  
Member

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Robert Monette  
Member